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No.

Supreme Court, U.S.

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In The  
**Supreme Court of the United States**  
October Term, 1989

STATE OF TENNESSEE,

*Petitioner,*

vs.

RONNIE M. CAUTHERN,

*Respondent.*

On Writ Of Certiorari To The  
Supreme Court Of Tennessee At Nashville

**PETITION FOR THE WRIT OF CERTIORARI**

CHARLES W. BURSON  
Attorney General & Reporter  
Counsel of Record

JERRY L. SMITH  
Deputy Attorney General

KYMBERLY LYNN ANNE HATTAWAY  
Assistant Attorney General  
450 James Robertson Parkway  
Nashville, TN 37219-5025  
(615) 741-3487

*Counsel for Petitioner*



## **QUESTIONS PRESENTED FOR REVIEW**

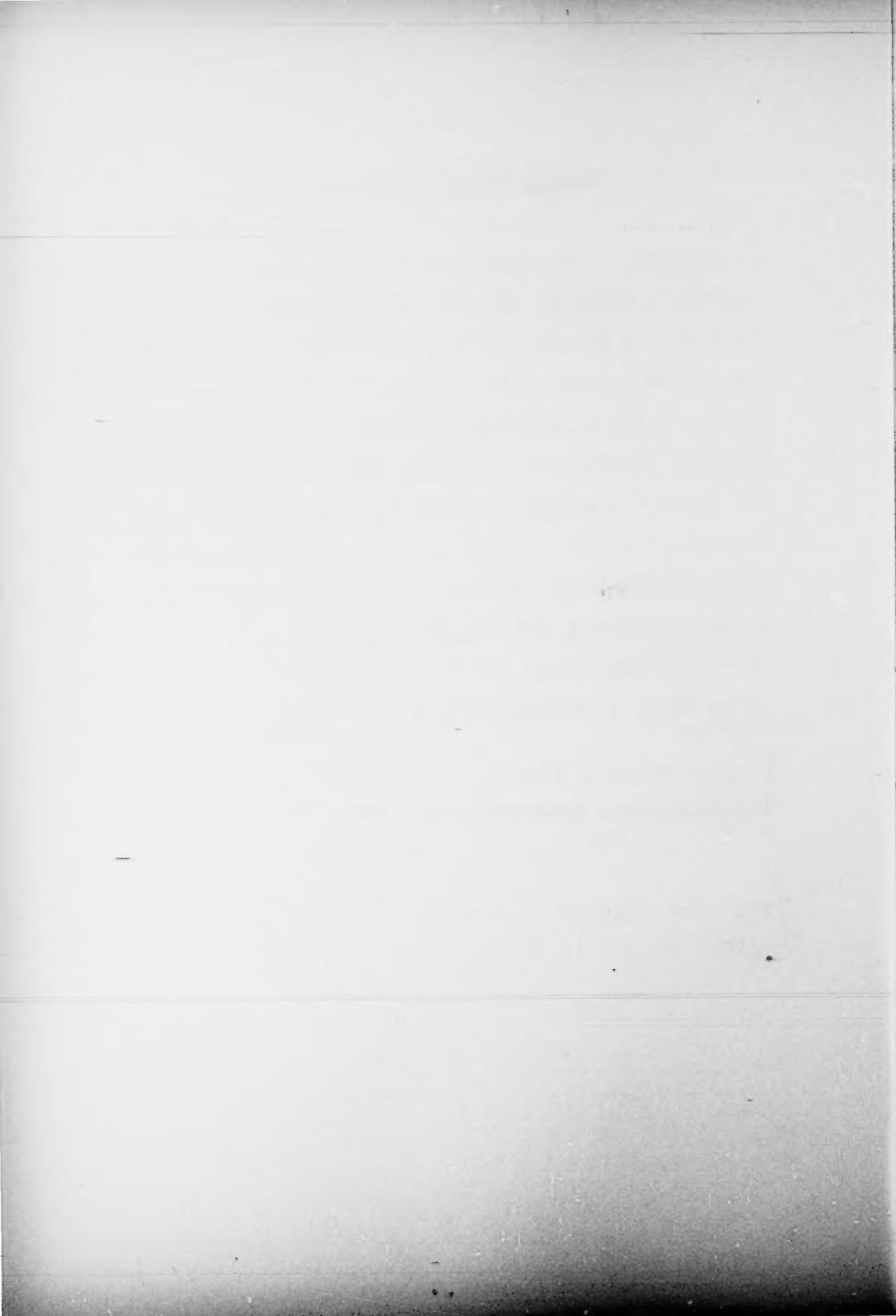
- 1. Whether the Supreme Court of Tennessee impermissibly expanded the scope of *Miranda v. Arizona* in concluding that the respondent invoked his right to remain silent by merely refusing to make a truthful statement and by indicating a desire to not have his statement tape recorded?**
- 2. Whether the alleged Fifth Amendment error was harmless beyond a reasonable doubt?**

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## PETITION FOR THE WRIT OF CERTIORARI

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## OPINION BELOW

The opinion of the Supreme Court of Tennessee was filed on September 25, 1989, and appears as Appendix A. This opinion has been designated for publication, but has not been published as of the date of the filing of this petition.

The tape recorded statement made by the respondent appears as Appendix B; this statement appears in its redacted form as submitted to the jury.

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## JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on September 25, 1989. This petition was filed within sixty (60) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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## CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. V:

No person . . . shall be compelled in any criminal case to be a witness against himself

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## STATEMENT OF THE CASE

On February 23, 1988, the respondent and co-defendant Brett Patterson were convicted in a jury trial of the felony murders of Patrick and Rosemary Smith, the aggravated rape of Rosemary Smith, and first-degree burglary. Following a sentencing hearing, the jury imposed sentences of death upon the respondent's convictions for felony murder and sentences of life imprisonment upon Patterson's convictions for felony murder. In sentencing the respondent to death, the jury unanimously determined the existence of three aggravating circumstances: The murders were especially heinous, atrocious, or cruel in that they involved torture or depravity of mind; the murders were committed during the perpetration of rape;

and the murders were committed during the perpetration of burglary.<sup>1</sup>

The jury's verdict was predicated, in part, upon proof showing that the respondent made two oral statements and a tape recorded statement subsequent to his arrest. In his first oral statement, the respondent denied any knowledge of the crimes. In his second oral statement, however, the respondent implicated himself in the commission of the crimes. The respondent also implicated himself in the tape recorded statement which was made subsequent to the oral statements.

Prior to the making of the first oral statement and the tape recorded statement, the respondent executed written waivers of his right to counsel and his right to remain silent. During the course of the recorded interrogation, the respondent indicated that he did not wish to make a truthful account of his participation in the crimes. In attempting to turn off the tape recorder, the respondent also indicated by his conduct that he did not wish to have his statement recorded. However, the respondent continued to answer questions after his unsuccessful attempt to stop the tape recorder. Toward the end of the questioning,

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<sup>1</sup> Tennessee Code Annotated §39-2-203(i):

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first-degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

the respondent turned off the (visible) tape recorder; an unseen tape recorder recorded the remainder of the interview. At the point the respondent stated that he was "through talking," the investigators immediately terminated the interview.

On direct appeal to the Supreme Court of Tennessee, the respondent challenged the admissibility of his two oral statements and his tape recorded statement on the basis that these statements had been involuntarily made. The court rejected the respondent's claim of coercion, but found plain error in the admission of portions of the tape recorded statement. Relying solely upon *Miranda v. Arizona*, 384 U.S. 436 (1966), the court determined that the respondent invoked his Fifth Amendment right to remain silent by attempting to turn off the tape recorder and by stating that he did not want to tell the investigators "again" "just exactly what happened" on the night the crimes were committed. (Appendix A, at App. 17-18).

In view of its decision concerning the admissibility of portions of the tape recorded statement, the Supreme Court of Tennessee conducted an analysis to determine whether the alleged error was harmless beyond a reasonable doubt. Focusing upon isolated statements made by the respondent both before and after the alleged invocation of his right to remain silent, the court concluded that the error prejudicially impacted upon the jury's imposition of the death penalty. Accordingly, the respondent's sentences of death were reversed and the case was remanded for a new trial. (Appendix A, at App. 18-20).

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## REASONS FOR GRANTING THE WRIT

**1. The Supreme Court of Tennessee impermissibly expanded the scope of *Miranda v. Arizona*, 384 U.S. 436 (1966), in concluding that the respondent invoked his right to remain silent.**

In reliance upon the Court's decision in *Miranda*, the Supreme Court of Tennessee concluded that the respondent invoked his right to remain silent during the course of a custodial interrogation. We submit that the state's highest court impermissibly expanded the scope of the *Miranda* decision by placing greater restrictions on the police as a matter of federal constitutional law.

In *Miranda*, the Court established procedural safeguards to protect the constitutional rights of persons subject to custodial interrogation. The *Miranda* Court held that unless law enforcement officers give certain specified warnings prior to questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, the state may not use in its case in chief any statement by the suspect, over the suspect's objection.<sup>2</sup> 384 U.S. at 476-479; accord *Michigan v. Mosley*, 423 U.S. 96, 99-100 (1975).

Among the procedural safeguards established by the Court is the "right to cut off questioning." *Miranda*, 384 U.S. at 474. This right, established as a "critical safeguard" of the Fifth Amendment right to remain silent,

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<sup>2</sup> At no time prior to, during, or after trial, did the respondent object to the admission of the tape recorded statement on the basis of an alleged violation of his Fifth Amendment right to remain silent.

*Mosley*, 423 U.S. at 103, requires the police to immediately cease interrogating a suspect once the suspect "indicates in any manner, or at any time prior to or during questioning, that he wishes to remain silent." *Miranda*, 384 U.S. at 473-474; *Mosley*, 423 U.S. at 100.

Although established in *Miranda*, the *Mosley* Court explored in greater detail the scope of "the right to cut off questioning." Reiterating that this right serves as an essential check on "the coercive pressures of the custodial setting" by enabling the suspect to "control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation," 423 U.S. at 103-104, the *Mosley* Court reaffirmed the requirement that "the interrogation must cease" when the person in custody "indicates in any manner" that he wishes to remain silent. 423 U.S. at 101-102. This requirement was incorporated into the Court's holding that statements taken after a suspect indicates his desire to remain silent are inadmissible unless the suspect's "'right to cut off questioning' was 'scrupulously honored.'" 423 U.S. at 101, 103-104.

While the invocation of the privilege against self-incrimination does not require "any special combination of words," *Quinn v. United States*, 349 U.S. 155, 162 (1955), "[n]othing . . . in the rationale of *Miranda*, requires authorities to ignore the tenor or sense of a defendant's response" to the warnings given pursuant to that decision. *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987). Thus, the privilege is not invoked where the suspect merely states that he "would not" answer a question. *Fare v. Michael C.*, 442 U.S. 707, 727 (1979). Likewise, the suspect's (belated) desire to not make a recorded statement

does not give rise to the level of invoking his right to remain silent. *Cf. Barrett*, 479 U.S. at 527.

The question presented here is whether the respondent invoked his right to remain silent by attempting to turn off the tape recorder and by stating that he did not want to tell the investigators "again" "just exactly what happened" on the night of the commission of the crimes. Considering that the fundamental purpose of the *Miranda* decision is "to assure that the individual's right to chose between speech and silence remains unfettered throughout the interrogation process," 384 U.S. at 469, is clear that the respondent did not rescind his prior written waiver of the privilege against self-incrimination by simply indicating that he did not want to truthfully divulge his participation in the crimes in a taped recorded statement.

Viewing the interrogation process in its entirety, and considering the context of the respondent's actions and words, we submit that the *Miranda* decision does not compel the result reached by the Supreme Court of Tennessee as a matter of federal constitutional law.

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**2. The alleged Fifth Amendment error was harmless beyond a reasonable doubt.**

In *United States v. Hasting*, 461 U.S. 499, 509 (1983), the Court made it clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless." See also, e.g., *Milton v. Wainwright*, 407 U.S. 371 (1972); *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967).

In the event the Court determines that the Supreme Court of Tennessee correctly concluded that the respondent invoked his right to remain silent, we submit that the Court should undertake an independent evaluation of the effect of the error.

While the Court has shown a tendency to defer to the lower courts in reference to the applicability of harmless error, see *Francis v. Franklin*, 471 U.S. 315, 325-326 (1985), *Connecticut v. Johnson*, 460 U.S. 73, 87, 102 (1983); but see *Harrington*, 395 U.S. at 254 (the Court's judgment as to whether constitutional error is harmless must be based on its own review of the record), the Court conducted its own evaluation of the proof in *Francis* and stated that its "primary task" in reviewing a lower court's harmless error determination "is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision." *Francis*, 471 U.S. at 326 n. 10.

We submit that even a cursory reading of the record in the case at bar compels the conclusion that the admission into evidence of the entirety of the respondent's tape recorded statement was harmless beyond a reasonable doubt. In this regard, the state's proof of aggravating circumstances was overwhelming, and the respondent presented only slight evidence in mitigation.

The record also reveals that the respondent, who was clearly the mastermind of the criminal episode, displayed a dispassionate and cavalier attitude toward his victims: The respondent claimed that he murdered Mr. and Mrs. Smith because they had only \$70.00 in cash in their home and because he wanted to be famous by being on the front page of the newspaper. The respondent even had

the unmitigated audacity to cast vicious aspersions on Mrs. Smith's character by stating in his pre-trial statements and by testifying at trial that he was involved in an affair with Mrs. Smith, and that Mrs. Smith "enjoyed" having sex with him on the night she was murdered.

The record further establishes that the respondent testified in conformity with the tape recorded statement at the punishment phase of the trial. With the respondent having committed the brutal murders of a husband and wife who dedicated themselves to helping humanity and who dedicated themselves to serving their country, we submit that there was no reasonable possibility that any error in the admission of the tape recorded statement contributed to the jury's verdict. Since the error could not have prejudicially impacted upon the jury's assessment of the appropriate punishment, the error was harmless beyond a reasonable doubt.

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### CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

CHARLES W. BURSON  
Attorney General & Reporter

JERRY L. SMITH  
Deputy Attorney General

KYMBERLY LYNN ANNE HATTAWAY  
Assistant Attorney General

450 James Robertson Parkway  
Nashville, TN 37219-5025  
(615) 741-3487

*Counsel for Petitioner*



APPENDIX A  
IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

STATE OF TENNESSEE,	)	<i>For Publication</i>
Appellee,	)	September 25, 1989
vs.	)	Montgomery County
RONNIE M. CAUTHERN,	)	Hon. John H. Peay,
Appellant.	)	Judge
	)	S. Ct. No. 88-41-I

*For Appellee:*

Charles W. Burson  
Attorney General & Reporter  
450 James Robertson Parkway  
Nashville, TN 37219-5025

Kymberly Lynn Anne  
Hattaway  
Assistant Attorney General  
450 James Robertson Parkway  
Nashville, TN 37219-5025

*For Appellant:*

Hugh Poland  
408 Franklin Street  
Clarksville, TN 37040

*OPINION*

REMANDED TO TRIAL COURT  
FOR RESENTENCING HEARING

WM. H. D. FONES, JUSTICE

This is a direct appeal of a death penalty case. Defendant Ronnie M. Cauthern and a co-defendant Brett Patterson were indicted for felony murder of Patrick Smith and his wife Rosemary Smith during the perpetration of first degree burglary, and aggravated rape of Mrs. Smith. The jury found both defendants guilty of the two murders, first degree burglary and aggravated rape. At the guilt

phase the jury sentenced Patterson to life imprisonment and Cauthern received the death penalty. Patterson's appeal is pending in the Court of Criminal Appeals. This case is the direct appeal of Ronnie Cauthern.

The Smiths were both captains in the U. S. Army stationed at Fort Campbell Kentucky. They lived in a split-level home in Clarksville, Tennessee, that they had purchased shortly after assignment to the nearby base. Both were nurses. When neither of them reported to their duty stations on the morning of 9 January 1987 and telephone calls to their home received no answer, two persons from the base went to their home, observed broken glass in the rear door, and both cars in the garage. A 911 call was made and the police arrived promptly and discovered the body of Patrick Smith lying face down on the bed in the master bedroom facing 90 degrees counter clockwise from his sleeping position, and wrapped in the top sheet. He had been strangled to death, apparently with a length of 880 military cord. The bed was broken and tilted indicating a violent struggle had taken place. His wife's nude body was found on the floor. A scarf was tied around her neck and a small vase had been inserted into the scarf. She died of strangulation, the vase was obviously used to twist the scarf and reduce the circumference. Both had massive hematoma of the neck area. Mrs. Smith's nightgown and buttons torn from it were found in the room. Semen was apparent on the gown and a comforter from the bed. Sperm was found in the vaginal vault. Tests revealed the presence of PGM Type 1 secretions. The forensic serologist testified that the PGM Type 1 from the swab "was consistent with Cauthern, as well as Rosemary Smith."

### App. 3

The police found the telephone line had been cut near its entry into the outside wall of the house. A shoe print was found on the back door that matched Patterson's shoe. In a statement that he gave police he admitted kicking the back door once or twice, but said it would not open so they obtained a hammer and broke the pane of glass nearest the door knob to gain entry. The house was ransacked, chest of drawers open, luggage and clothing scattered about. In the master bedroom, the police found a piece of paper upon which was written defendant Cauthern's name, address and telephone number. Rosemary Smith's sister testified she was familiar with both her sister's and her brother-in-law's handwriting and the information about Cauthern was not written by either of them. The cumulative evidence in this record establishes that defendant and the Smiths had been acquainted for approximately a year at the time of the murders, that he had performed some work on Patrick's Mercedes and perhaps some additional work at their home, although he said in one of his statements that he had never been inside their home until the evening of 8 January 1987.

As far as this record shows the investigation of these murders did not focus on Cauthern and Patterson until James Phillip Andrew telephoned the Clarksville Police and asked to speak to an officer he had seen on T.V. news in a segment reporting on the double murder. That call was made about 11:00 a.m. Monday morning 12 January 1987. A meeting with Andrew was arranged and as a result of the information he gave police, defendant and Patterson were arrested that afternoon.

Andrew was in the U. S. Army stationed at Fort Campbell. He was living in a trailer located in a mobile

home park in Oak Grove, Kentucky, which he shared with Joe Denning and another man. Joe Denning was acquainted with defendant and Patterson and Andrew became acquainted with them through Denning. Andrew testified that defendant and Patterson came to the trailer to see Denning about 3:00 or 4:00 a.m. on Friday morning, 9 January, that after being awakened by their arrival he went back to sleep and neither heard nor saw anything relevant to the Smith murders. Andrew went to work at the base as usual that day and saw defendant again that night at the trailer and later at Rockvegas. It was not until Saturday afternoon at the trailer when they started to get "high" smoking marijuana that defendant began telling Andrew about his role in the Smith murders. Andrew did not believe him until defendant went to his car trunk and brought a box into the trailer containing credit cards, identification cards in the names of Patrick and Rosemary Smith, clothing and other items of personal property taken from their home.

Defendant gave several statements to the police, one of which was recorded on tape, transcribed and introduced at trial. Although he admitted participating in a robbery of the Smith premises, he denied that he "planned" anything or raped or murdered anyone. He claimed that he had had sexual relations with Mrs. Smith twice before and that she invited him to come to the Smith house and knock on the back door that Thursday evening. His statement to the police contained numerous contradictions and discrepancies. The "statement" he gave Andrew on Saturday afternoon while high on marijuana more closely coincided with proven events than

any version that appears in this record. We quote from that part of Andrew's testimony, as follows:

A He said that him and Patterson went to the Smith's house - see, I didn't know the names then.

Q Was the name at that time not in the murder report in the paper?

A They weren't in the newspaper, there were no names and he said how they broke into the house, they kicked the door and they broke the window in the door, they opened the door, went in and they said they were sleeping and they woke up and Mr. Smith - you know, kept saying - what do you want and he said - Ronnie said that Patterson had jumped Mr. Smith and Ronnie had told Mrs. Smith to get in the closet. While he was doing that, they were trying to strangle - said they was trying to strangle Mr. Smith and Ronnie took Mrs. Smith in another room and said he had raped her then and went back in to help Patterson with Mr. Smith, and they said they couldn't get him down and they had to use a strap or belt, I don't know, to strangle him, and when they got him down, they both went in and then they raped her and then Ronnie killed Mrs. Smith -

Q Ronnie killed who?

A Mrs. Smith.

Q Did he tell you how he killed Mrs. Smith?

A Yes.

Q Tell the ladies and gentlemen of the jury that he told you as to how he did that?

A Okay, he first tried to strangle her, he couldn't do it, and then he grabbed the scarf,

wrapped it around her neck and put a vase in it like a tourniquet and turned it until she strangled.

Q Did he talk to you about the sexual -

A Yes.

Q What did he tell you about that?

A He says - that she wasn't putting up a fight, she enjoyed it.

Q He told you that she was enjoying it?

A She enjoyed it, yes.

Q Anything else he said about the rape?

A Not about the rape, no - after that, do you want me to keep going?

Q Just tell the ladies and gentlemen - you just tell them what he told you, everything he told you about this incident over at the Smith house.

A And he said they started going through the house, that they were piling up things they were going to take in one pile and they took the VCR and there was a cord on the TV, they put this cord behind the TV and put books on the TV so it would look like they didn't have one.

Q What no, I didn't understand that, I am sorry.

A They said there was a VCR on the TV, and a plug in the back of the VCR, they threw the cord behind the TV and put books on it to look like there was no VCR on top of the TV.

Q They were gathering up other stuff - did he say why they would do that?

A They planned on taking everything they had piled up.

Q Oh, okay.

A And then they changed their minds, they took the VCR, their wallets -

Q Did he say - was anything mentioned about any jewelry?

A Yes.

Q What was that?

A He showed us a band.

Q He showed you what?

A The wedding band of Mr. Smith's.

Q Mr. or Mrs.?

A Mr. Smith's. He said he give the ring to his girlfriend.

Q But he showed you a wedding band?

A He showed me a wedding band.

Q A man's wedding band?

A I only got a glimpse of it 'cause he want [sic] out to the car and got all the stuff to prove it that he did it.

In addition Andrews testified that he asked defendant why he killed the Smiths and his response was they only had \$70 and that made him mad. He said he had worked around the house, they were doctors and "always had money." Andrew was asked if defendant indicated to him he was having "some kind of an affair" with Mrs. Smith. His response was that defendant always told them "who he was messing around with" and he never said anything about "messing around with her."

Patterson gave a statement to TBI agent Breedlove and an investigator for the Clarksville Police Department.

He said they were "originally supposed to be hitting some place owned by a guy by the name of Charles Hand." Defendant told him that Hand would have "like \$15,000" in the trunk of his car, at night, and all they had to do was "pop the trunk and be gone." The car was not at Hand's house, so defendant told Patterson he knew another place where nobody would be home and they could pick up a couple of thousand. Defendant said he had worked for them and knew no one would be home. They drove up behind the house, got a hammer, screwdriver and other stuff out of the trunk of defendant's car and went to the back door. He tried to kick the back door open but defendant had to break the glass panel to get it open. He said they both had on leather gloves and ski masks. He checked out the downstairs with a flashlight "just looking stuff over, seeing what was there." When he went upstairs defendant was "wrestling with this guy on the bed." He thought defendant had already put the woman in the closet of the other bedroom. He said he was armed with a .45 caliber automatic and defendant had a .38 caliber. He said all he could think about was that this guy's going to get the better of defendant and he jumped in, turned him over face down and "put him in a sleeper, put him out." Smith was supposed to be out three to five minutes, but it didn't last that long, so he got a pillow case and tried to put it around his neck but it wasn't working and defendant handed him some twine, that was 880 military cord and he "used it like a garrote. All I wanted was to put him out so we could get the (expletive) out of there." He said he went in the other room, defendant said "it's your turn" and he had sex with the woman. In the meantime defendant had stacked

up a lot of stuff, a couple of bags, a purse, VCR; they loaded it up and got out of there. He said that when he left the bedroom, the woman was alive and there was no gag or anything around her neck. He was asked if defendant said, "what he did with her." Patterson responded, "He said he strangled her."

When defendant and Patterson were arrested Monday afternoon, they were working on defendant's car at a duplex where they lived. Search warrants were obtained and from the car and the house numerous credit cards, identification cards, receipts, checks and other items of personal property belonging to the Smith's were found. Also, a roll of 880 military cord was found.

Defendant's girl friend testified that defendant and Patterson accompanied her to Arby's on Thursday night 8 June 1987 at about 9:30 p.m. She had a sandwich but they did not eat. Their eyes were dilated, and they weren't saying much. They were "laid back." She was sure they were not drinking because she could not smell anything, and she was a part-time bartender. She expressed the opinion they were on acid. She said defendant had told her several days before that, that he had ten hits of acid and on Wednesday night he told her he had been doing acid with Pat and Joe. She was on her way to report to work at 10:00 p.m. at Rockvegas, a bar and rock and roll joint. Defendant rode in her car from Arby's to Rockvegas and they smoked a marijuana cigarette on the way. Patterson left Arby's driving defendant's Camaro Z-28.

She also testified that on Friday 9 January defendant called her about noon, picked her up at her home about 1:00 p.m. and they rode around in the rain. He gave her a

watch, a wedding band and a wedding ring to "hold on to for him for a while." She saw him again on Sunday. He was jolly, in a good mood and told her again that he was planning to leave for Chicago - he had told her a week or more before the Smith murders that he was going to Chicago. He was always nice, courteous and pleasant with her, except for one occasion, and she had no basis whatever to suspect him of complicity in the Smith murders until her sister called her on Monday or Tuesday and told what she had heard on T.V. She tuned in the 10:00 p.m. news and heard the report that defendant had been arrested. She talked to her parents and went to the police station the next morning, gave them the wedding rings, watch and a stereo that defendant had installed in her car before the murder.

The first issue defendant raises on this appeal is that the trial judge erred in failing to suppress all of the statements defendant made to police because they were obtained by coercion.

Defendant made two oral statements on 12 January, the day he was arrested and gave a taped interview on Tuesday, 13 January 1987. The officers to whom the statements were given were Charles Denton and Joe Griffy. Defendant's counsel contends that defendant had worked for those officers for about one year prior to the murders, as an informer and an undercover man; that defendant trusted them, that a friendship existed between defendant and the two officers and that, "this very young naive defendant was coerced and persuaded by Denton and Griffy into giving the only really damaging confession."

At the suppression hearing, pre-trial, Officers Denton and Griffy testified, defendant did not testify. The first oral statement was made shortly after he was brought to the police station from the place of arrest. He was given complete *Miranda* warnings and signed a waiver. He denied any knowledge of the Smith murders or burglary.

The so-called second oral statement was made to Griffy, who had taken defendant from Denton's office to the booking room for processing, fingerprinting, photographing, etc. Griffy testified that while that was going on defendant began telling him about some things about the Smiths. He told him that he had known them for some time, had worked on the Smith's car and was having an affair with Mrs. Smith, that she called him during the day of the murders and told him to come by that night; that he and Patterson went to the house, knocked on the door for 15 or 20 minutes and couldn't get in; that Patterson said, "let's break in", and tried to kick the door down but couldn't so defendant broke the glass, reached in and unlocked the door. Griffy gave no explanation for defendant stopping at that point, but that was the extent of the second statement, given about 4:00 p.m. on 12 January.

Earl Mullins, a jailer, testified that he was calling the roll at the jail around 3:00 p.m. on 13 January and as he passed Cauthern's cell, Cauthern asked him to contact Officer Griffy or Denton and tell them he wanted to talk to them. Mullins delivered that message and the officers came to the jail about 4:00 p.m., again gave defendant full *Miranda* warnings and he signed a waiver of rights. Just before the warnings were read to defendant he said:

CAUTHERN: But, I', I'll tell you how it is. If I'm going to have to spend five years, I'd rather just die. O.K.?

And, later:

CAUTHERN: It is to me, I mean, I'm going to go crazy up there. I'm going crazy up there now.

The *Miranda* warnings were read and the last two sentences in the warnings were as follows:

. . . If you decide to answer any questions now without a lawyer present, you still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer. Do you understand your rights?

Defendant then said that his lawyer had told him that he wasn't supposed to "say nothing unless he was here. Does that mean that I can't." Denton responded that it was up to him, that he could waive his right to an attorney and talk to him. Denton then read aloud the contents of the waiver as follows:

DENTON: It says here, I have read the statement of my rights and I understand what my rights are. I am willing to make statements and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me. And if you want to talk to us without your lawyer, you need to sign this right here on these lines.

He signed the waiver and the taped interview proceeded. On page 22 of the transcript of that interview, he expressed his first reservations about talking to the officers, as follows:

DENTON: Are you guilty?

CAUTHERN: Of murder, no.

DENTON: What are you guilty of?

CAUTHERN: Not rape and murder and taking anything.

DENTON: After telling me things, would you like to tell me again, just exactly this time, just exactly what happened?

CAUTHERN: No.

DENTON: Why?

CAUTHERN: Cause I know what I'm facing.  
(attempted to turn off machine)

DENTON: It's got to stay on.

CAUTHERN: No. Chuck.

DENTON: Do you know of anything else that was taken out of the house?

CAUTHERN: A man's wedding band was taken and pawned in a pawn shop.

DENTON: Do you know which one?

CAUTHERN: No.

DENTON: How much money did you get for it?

CAUTHERN: Twenty dollars.

The interview continued with Denton asking about items of personal property taken, most all of which had been found by the police, in the defendant's car and the residence of defendant and Patterson. Defendant was asked what time they left the house, where they went and who saw them and defendant answered. Then defendant cut

off the tape recorder that he was aware the officers were using. However, they had a hidden tape recorder that picked up the following:

DENTON: Don't cut it off.

CAUTHERN: And I know it's over and I know I can't change it and that's it. It was my fault.

DENTON: We can't cut this off, they'll throw everything out.

CAUTHERN: They can throw it all out.

DENTON: It's got to stay on.

CAUTHERN: No, Chuck.

DENTON: Go ahead.

CAUTHERN: I mean, I couldn't stop it, there were no way for me to.

DENTON, Ronnie, you planned this thing.

CAUTHERN: No, I didn't.

DENTON: You went to this house?

CAUTHERN: I didn't plan it, Chuck, I did not plan it. I knocked on the door for her to come downstairs.

DENTON: Ronnie, you sit here and lie to me again. You've said that you didn't take the stuff out, the watch and the ring were brought back to the office today by the young lady you gave it to.

CAUTHERN: I didn't take it. There's a wedding band from him to, somewhere. In a pawn shop.

DENTON: Which pawn shop?

CAUTHERN: I don't know. The ring was pawned for twenty dollars.

DENTON: Do you know of anything else that was taken out of the house?

CAUTHERN: A man's wedding band was taken and pawned at a pawn shop.

DENTON: Do you know which one?

CAUTHERN: No.

DENTON: How much money did you get for it?

CAUTHERN: Twenty Dollars.

CAUTHERN: Chuck, this ain't right

DENTON: I know it's not right, Ronnie. I know it's not right. I can tell by looking in your beady little eyes you're not telling the truth and we're wasting our time.

DENTON: What are you doing that for?

CAUTHERN: Rewinding it.

DENTON: Through?

CAUTHERN: Yeah.

DENTON: I need to put on there what time we terminated, let me handle this, O.K.

CAUTHERN: I say we destroy it.

DENTON: No we're not going to destroy it.

CAUTHERN: Why?

DENTON: Quit.

CAUTHERN: Come on, Chuck.

DENTON: Quit, Ronnie.

GRIFFY: You through talking Ronnie?

CAUTHERN: Yes. (inaudible)

DENTON: Investigation interview terminated 4:53, January 13. Ronnie Cauthern has been taken back to his cell. Joe Griffy and Charles Denton terminating the interview.

During the cross-examination of Officer Griff [sic, Griffy], defense counsel established that defendant had "worked with" Griffy and Denton, "turning up certain things" for a period of "at least six months" preceding the Smith murders; that it was "easy for defendant to talk to "you"; and that both officers knew, before the third statement was given that counsel had been appointed to represent defendant and had advised defendant not to talk to anyone unless counsel was present. That was the extent of the evidence of the "friendship" between defendant and the two officers upon which defendant bases his claim of "coercion and persuasion" to the extent that defendant's statements were not freely and voluntarily given. Without some expression from defendant about what the prior relationship meant to him and to what extent it motivated his actions with respect to the statements made, we find that the prior relationship had no significant effect upon the voluntariness of either of the statements at issue.

Defendant cites *U. S. v. Henry*, 447 U.S. 264, 100 S.Ct. 2183 (1980) and *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232 (1977) in support of his insistence that the third statement should be suppressed. Neither case has any application to the facts in this record. In *Henry* defendant made statements to an informer the government had planted in his cell, unknown to defendant. Obviously there was no voluntary waiver of rights, as in the case at

bar. In *Brewer*, the police initiated the interrogation, contrary to an express agreement with defendant's counsel, did not give warnings nor obtain a waiver.

The trial judge expressly found that defendant "voluntarily initiated" the interview that resulted in the third statement, given on the afternoon of 13 January 1987, and after reading *Henry* and *Brewer*, cited to him by defendant's counsel at the hearing, denied the motion to suppress. We find that defendant initiated the interview, was given full *Miranda* warnings and freely, knowingly and voluntarily executed a written waiver of his right to remain silent and his right to counsel. The U. S. Supreme Court has clearly sanctioned the admissibility as [sic, of] a statement given after the appointment of counsel and even after defendant has "expressed his desire to deal with police only through counsel", where defendant initiates further communication, electing "to face the state's officers and go it alone," and knowingly and intelligently waives his Sixth Amendment right to counsel. *Patterson v. Illinois*, 108 S.Ct. 2389 (1988); *Edwards v. Arizona*, 451 S.W.2d 477, 101 S.Ct. 1880 (1981).

The real problem with the admissibility of the entire third statement arises with defendant's efforts to rescind his waiver of the Fifth Amendment right to remain silent.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) the Court held:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise

his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

86 S.Ct. at 1627, 1628

Defendant sought to terminate the interrogation at page 22 of the transcript of his statement when after saying he was not guilty of rape, murder or taking anything, Officer Denton said, will you tell us again "just exactly what happened?" and he responded "No" and attempted to turn off the tape recorder. The officers should have terminated the interview at that time.

Defense counsel did not focus on that aspect of the statement in the trial court or in this Court, but we are compelled to find that the admission of the contents of the statement, as and after defendant's first attempt to turn off the tape recorder was plain error, in violation of the teachings of *Miranda*.

That holding requires that we determine whether the error was harmless or reversible pursuant to the harmless error test in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967). See *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174 (1972). We can say without hesitation that the contents of the statement that should have been excluded from the jury's consideration, although constitutional in scope, did not contribute to the verdict that defendant was guilty of murder in the first degree, and was harmless beyond a reasonable doubt on that issue. However,

the determination of its effect on the verdict of death as punishment presents a more difficult issue.

As defendant attempted to turn off the machine, he said he knew what he was facing. It is obvious that he had reference to the electric chair. He had said at the beginning of the statement, as a reason for his willingness to talk to them without his lawyers, that he would rather die than spend five years in prison. Having revealed damaging facts that unmistakably implicated him in burglary, rape and murder he faced the prospect of death, changed his mind and wanted to stop. Later, he succeeded in turning off the machine and tried to erase the tape and asked the officers to destroy it.

Defendant's statement that he knew what he was facing plus his later statement that: ". . . I know it's over and I know I can't change it and that's it. It was my fault." followed by, "I mean, I couldn't stop it, there was no way for me to." could have been one of the factors, if not the leading factor in the jury's verdict of death in defendant's case and life imprisonment in *Patterson's* case.<sup>1</sup> For that reason we cannot find the admission of

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<sup>1</sup> There was sufficient evidence of other factors in support of the jury's verdict to give Cauthern the death penalty and Patterson life imprisonment that would enable this Court to find that the sentence of death was not imposed on Cauthern in any arbitrary fashion, or was excessive or disproportionate to the penalty imposed in similar cases. However, that circumstance does not alter the fact that the inadmissible portion of defendant's 13 January statement cannot be said to have had no effect on the verdict of death and that it was harmless beyond a reasonable doubt.

that part of the statement harmless with respect to the verdict of death, and a remand for a resentencing hearing will be necessary.

In the next issue raised by defendant, he makes an elaborate argument premised upon the theory that "malice" was used as an element to obtain a conviction of murder in the first degree, and that "malice" is synonymous with "heinous", "atrocious" and "depravity", which was used as an aggravating circumstance in the sentencing phase to obtain the death penalty. Defendant says that double use of malice violates the Eighth Amendment to the U. S. Constitution. Defendant is mistaken, factually and legally. Defendant was indicted and convicted of felony murder. Malice is not an element of felony murder. There is no Eighth Amendment prohibition against using an element in the conviction of first degree murder and using the same element in an aggravating circumstance to support the death penalty. See *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546 (1988). This issue has no merit.

Next, defendant says the trial judge abused his discretion in "refusing to allow individual voir dire regarding pretrial publicity," and, "to allow defense counsel to question jurors regarding their feelings about the death penalty, other than to ask questions based on the standards set forth in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770 (1968). Defendant failed to cite any particular ruling, by reference to any volume or page of the record, by a juror's name, or otherwise. Our review of the record to respond to this generalized complaint reveals no factual basis whatever for either complaint. The trial judge did permit individual and sequestered voir dire of jurors

who indicated in general questioning that they had been exposed to pretrial publicity. With respect to questioning about the death penalty, we find that there were several instances where defendant's counsel asked wholly improper questions and the trial judge properly so ruled. There is no merit to this issue.

Defendant contends that the death penalty statute is unconstitutional because if any one of the aggravating circumstances is proven the statute shifts the burden to defendant to prove mitigating circumstances that outweigh the aggravating circumstance; and he says the statute does not "meaningfully limit the class of death eligible defendants." We have considered and rejected similar constitutional attacks on the statute, most recently in *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989). There is no merit to this issue.

Finally, defendant asserts that the death penalty is a cruel and unusual punishment. He relies upon the dissenting opinion in *State v. Dicks*, 615 S.W.2d 126 (Tenn. 1981). We continue to adhere to the majority opinion in that case.

We find that no prejudicial error was committed bearing upon the verdict of murder in the first degree, and that the evidence is such that any rational trier of fact could find guilt beyond a reasonable doubt in conformity with *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979) and T.R.A.P. 13 (e). The verdict imposing the death penalty is set aside for the reason given and the case is remanded to the trial court for a resentencing hearing.

App. 22

/s/ Wm. H. D. Fones  
Wm. H. D. Fones,  
Justice

Concur:

Drowota, C.J.  
Cooper, Harbison, O'Brien, JJ.

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APPENDIX B

Interview with Ronnie Cauthern

Re: Smith Homicides  
352 Hampshire Dr.

Page 1 of 30

GRIFFY: Well, I'm right, I guarantee you, I'm right.

DENTON: Give me your date of birth, 09 something.

CAUTHERN: Five.

DENTON: Five.

CAUTHERN: First thing I want to know, is Joe Denning in jail?

DENTON: Not yet.

CAUTHERN: My daddy just told me he was.

GRIFFY: I don't think he is.

Inaudible. . . .

GRIFFY: He may be but (inaudible)

CAUTHERN: Ya'll charged him with anything?

GRIFFY: We didn't. Chuck and I didn't charge him with anything.

CAUTHERN: He should be.

DENTON: You ready?

CAUTHERN: Uh-huh.

DENTON: Joe, are you ready?

CAUTHERN: Have you told him anything?

GRIFFY: Basically, just bits and pieces.

CAUTHERN: I didn't lie to you Chuck, I just didn't tell it.

DENTON: O.K.

CAUTHERN: O.K.

DENTON: I knew when you got ready, you'd tell me.

(p. 2) CAUTHERN: I had to think about it.

GRIFFY: (inaudible) tell everybody that.

CAUTHERN: But I', I'll tell you how it is. If I'm going to have to spend five years, I'd rather just die. O.K.?

GRIFFY: Now, what now?

CAUTHERN: I mean if I tell you . . .

DENTON: (inaudible)

CAUTHERN: It is to me, I mean, I'm going to go crazy up there. I'm going crazy up there now.

GRIFFY: Well.

CAUTHERN: I feel a lot better with warm shoes on.

DENTON: Time is eight minutes after four p.m., January 13, 1987. Present, Charles Denton, Joe Griffy, and Ronnie Cauthern. This will be a taped interview taking place here at the Montgomery County Jail at the request

of Ronnie Cauthern. And Ronnie, I'm going to start and what I'm going to do here is I'm going to read you your rights. I want you to read along with me. It says before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in Court. You have a right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford to hire a lawyer, one will be appointed to represent you before questioning, if you wish one. If you decide to answer any questions now without a lawyer present, you still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer. Do you understand your rights?

CAUTHERN: Yes.

DENTON: O.K., this is the waiver. You want to talk to us.

CAUTHERN: My lawyer (inaudible) but he said I wasn't supposed to say nothing unless he was here. Does that mean I can't?

(p. 3) DENTON: That's up to you.

CAUTHERN: I mean, you know . . .

DENTON: What this is, you can waive your right to an attorney and talk to us.

CAUTHERN: O.K.

DENTON: It says here, I have read the statement of my rights and I understand what my rights are. I am willing to make statements and answer questions. I do

not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me. And if you want to talk to us without your lawyer, you need to sign this right here on these lines.

CAUTHERN: You got me on tape?

DENTON: Yes, that's how we, that way we won't miss anything.

GRIFFY: I got writer's cramp yesterday.

DENTON: Now, where do you want to start? Do you want to start at the beginning or you start where you want to. I may ask you questions from time to time, you just start from wherever you want to start, whatever time.

CAUTHERN: Thursday at 4:30, 4:30 (inaudible), I got a call, from Rose, come see her and didn't arrive there until 10:30 or 11 that night. When I arrived there, I was a passenger in the Camaro. When I knocked on the back door, the one she told me to go to, nobody answered. When I started to leave, the back door was kicked and it wouldn't open. The door window was broken and the door was opened reaching in and turning the handle, a flashlight was used to look through the house, a pair of pliers was obtained from the car and the phone line cut. I went upstairs and went straight to the back bedroom where Mr. Smith sat up in bed and yelled "who is it". Mr. Smith was grabbed. And turned over on the bed and Rose hadn't woke up until [ ] Mr. Smith yelled. And she started to get out of bed and I grabbed her and tried to get her away.

(p. 4) CAUTHERN: Mr. Smith was in the bed and when he sat up, Mr. Smith was grabbed and turned over and put under a pillow. And Rose started screaming and I got here out of the room and took her into the front living room and told her to stand there and then I told her to go get in the closet and hide.

DENTON: Which closet?

CAUTHERN: The one in the center bedroom. There was a fight with Mr. Smith in his room. I went to use the phone and I didn't realize it was out. I went back downstairs and when I come back up, Mr. Smith was dead or he was just laying there out. I don't think he was dead, though, cause you could still hear him. There was a pillow case laying on the bed, it was stretched out and I ran through the house again, went back downstairs and I come back up. Rose wasn't in the closet and she was in the house and was being grabbed.

DENTON: Which room were they in?

CAUTHERN: She wasn't in the room then, she come back up the hall and was grabbed and she was going back into the bedroom. And she took her clothes off, voluntarily.

DENTON: Where?

CAUTHERN: In the center bedroom, then she told me she was sorry. A rope was tied around Mr. Smith's neck.

DENTON: Where did the rope come from?

CAUTHERN: Out of a coat pocket. A black jacket.

DENTON: What color coat did you wear?

CAUTHERN: A gray jacket identical to this one.

DENTON: Kind of like a Member's Only?

CAUTHERN: No, it wasn't a Member's Only, it was, it was made out of material.

DENTON: But it was like, that is similar to a Member's Only Jacket?

(p. 5) CAUTHERN: Right.

DENTON: It was that type of jacket?

— CAUTHERN: Right, but it was material. And it was insulated. Nothing else happened (inaudible). Mrs. Smith was going to be choked, I went to stop this but couldn't and the choking proceeded.

DENTON: How was she choked?

CAUTHERN: By grabbing her neck and pulling a scarf back on it.

DENTON: Where was the scarf?

CAUTHERN: It was around her neck

DENTON: Already around her neck?

CAUTHERN: It was already around her.

DENTON: Do you know where the scarf came from?

CAUTHERN: No.

DENTON: Was it brought to this house?

CAUTHERN: No.

DENTON: It was at her house?

CAUTHERN: It had to have been.

DENTON: When you saw her, the scarf was around her neck.

CAUTHERN: Right.

DENTON: And then what happened?

CAUTHERN: The choking of Mrs. Smith began then stopped and she, I think she was still alive. Cause I checked and said we have to leave and leave them alone and then I went back upstairs and a ball or something was twisted on her neck and left her there, and nothing was taken from the house, nothing was mentioned.

DENTON: And then what did you do?

(p. 6) CAUTHERN: Left.

DENTON: Where did you go?

CAUTHERN: Went straight to RockVegas.

DENTON: O.K., who did you see at RockVegas?

CAUTHERN: I saw Johnny the bartender, Jackie . . .

DENTON: Jackie who?

CAUTHERN: Lambert.

DENTON: Is that a male or female?

CAUTHERN: It's a girl.

DENTON: How long did you stay there?

CAUTHERN: At RockVegas, about two hours. This all took place in less than thirty minutes.

DENTON: At the house?

CAUTHERN: Right.

DENTON: What did you cut the telephone line with?

CAUTHERN: A pair of wire cutters.

DENTON: Where did you get them?

CAUTHERN: Out of a tool box in my car.

DENTON: Did you put them back in the tool box?

CAUTHERN: I don't know.

DENTON: Did you see the wire cutters any more that night?

CAUTHERN: Unh-Unh (negative response).

DENTON: Have you seen them since?

CAUTHERN: No.

DENTON: Do you know if they're still in your tool box?

CAUTHERN: Not my tool box.

(p. 7) CAUTHERN: (inaudible) one handle . . .

DENTON: Orange handle?

CAUTHERN: It's a kit.

DENTON: In a little plastic box container or?

CAUTHERN: Yes, it's a plastic kit with needlenose, wire cutters\_\_\_\_\_, and I believe it's got a screw-driver. And the rope is the same kind that was on the kitchen table.

DENTON: Was it a military type rope?

CAUTHERN: On a big spool. And you found the sawed-off shotgun that belongs to Joe Denning; the .45 belongs to Joe Denning and the .38 and one holster.

DENTON: Where is the .38?

CAUTHERN: I don't know.

DENTON: When was the last time you saw it?

CAUTHERN: It was in the holster in the back with the shotgun.

DENTON: What night?

CAUTHERN: Uh, Saturday night.

DENTON: Did you have sex with Ms. Smith?

CAUTHERN: I saw her the day before.

DENTON: What time?

CAUTHERN: About 7 in the afternoon.

DENTON: Seven in the evening. Where did you see her?

CAUTHERN: I saw her at Faith Drive and we went out to dinner.

DENTON: Where did you go?

CAUTHERN: We went out to dinner at Stacey's and as soon as we left there we went straight back to Faith Drive and I went in.

(p. 8) DENTON: O.K., so you're sayig [sic, saying] you've been seeing her for some time.

CAUTHERN: On and off.

DENTON: And you've had sex with her in the past. Did you have sex with her the night before she died?

CAUTHERN: Yes.

DENTON: There at the house?

CAUTHERN: Not at her house.

DENTON: Where did you have sex with her at?

CAUTHERN: At Faith Drive.

DENTON: Do you know that address?

CAUTHERN: Faith Drive.

DENTON: Was anyone else there?

CAUTHERN: No.

DENTON: What time of night was it when you got to the trailer and had sex with Mrs. Smith?

CAUTHERN: It wasn't a trailer.

DENTON: Faith Drive.

CAUTHERN: It was late, uh, it was between, after dinner, cause we couldn't go out and eat nowhere because Mr. Smith might see us.

DENTON: You met her at her house?

CAUTHERN: No, I did not meet here at her house, never met her at her house.

DENTON: Where did you have, where did you make contact with her?

CAUTHERN: Faith Drive.

DENTON: She met you at Faith Drive?

CAUTHERN: Right.

(p. 9) DENTON: And then you went and eat?

CAUTHERN: Right.

DENTON: At Stacey's Restaurant?

CAUTHERN: I didn't go in to eat.

DENTON: How did you . . .

CAUTHERN: Went in and ordered two hamburgers and left.

DENTON: Who ordered it?

CAUTHERN: I did.

DENTON: You went inside and ordered two hamburgers. Did anybody see her with you?

CAUTHERN: No.

DENTON: Whose car were you in?

CAUTHERN: Mine.

DENTON: Which car?

CAUTHERN: The Camaro.

DENTON: Then you went back to Faith Drive?

CAUTHERN: Right?

DENTON: Where ya'll went inside and how long was you there?

CAUTHERN: An hour.

DENTON: You had sex and . . .

CAUTHERN: She left in her car.

DENTON: Say yes if you had sex.

CAUTHERN: Yes.

DENTON: The tape recorder won't pick up nods and head movement. And then what happened?

CAUTHERN: She left. And called me the next day?

DENTON: And called where?

(p. 10) CAUTHERN: Called. First, she called out to Tom's house and there was no answer and she called out in the country where I was working on a car.

DENTON: Where?

CAUTHERN: Out in Erin.

DENTON: Whose house?

CAUTHERN: Dean Akin.

DENTON: Was he there?

CAUTHERN: No.

DENTON: Was anyone there?

CAUTHERN: His son was there.

DENTON: Did his son answer the phone?

CAUTHERN: Yes.

DENTON: O.K., who told you that she called out there?

CAUTHERN: They told me someone called.

DENTON: They told you that someone called.

CAUTHERN: They didn't tell me that it was her.

DENTON: O.K. Go ahead.

CAUTHERN: Uh, I figured it was her and I called her house to check.

DENTON: And what time was this when you called her house?

CAUTHERN: I called several times that day and didn't get an answer, it was after she got off work, it was around 5:00.

DENTON: What time does she normally get off?

CAUTHERN: 4:30.

DENTON: She usually gets home at what time?

(p. 11) CAUTHERN: Five.

DENTON: On any other occasions, have you had sex with her?

CAUTHERN: Yeah.

DENTON: How long ago?

CAUTHERN: Uh, months ago. When I worked on their car.

DENTON: Where did you work on their car?

CAUTHERN: Always at my house.

DENTON: She'd drive her car to your house?

CAUTHERN: No, it'd be the Mercedes; that was the only car I worked on.

DENTON: Where did you have sex with her months ago?

CAUTHERN: In the car.

DENTON: In the mercedes?

CAUTHERN: Right.

DENTON: Where were you parked?

CAUTHERN: On a gravel road out there.

DENTON: How did the Mercedes get to your house?

CAUTHERN: She drove it.

DENTON: You worked on the vehicle . . .

CAUTHERN: Right.

DENTON: After you got, through, what?

CAUTHERN: We had sex, she paid me, she went home.

DENTON: How much did she pay you for working on the vehicle?

CAUTHERN: That time, it was seventy-five dollars.

DENTON: What type of work did you do on the vehicle?

CAUTHERN: Stereo, I put an antenna in it, put cord in it and (p. 12) put new speakers in the front.

DENTON: Is that the first time you ever had sex with her?

CAUTHERN: Yes.

DENTON: About what time of the night was it?

CAUTHERN: About nine or ten o'clock.

Inaudible due to announcement coming over jail loudspeaker.

CAUTHERN: And Mr. Smith drove hers and she drove the mercedes.

DENTON: So you've had sex with her on more than one occasion?

CAUTHERN: Right.

DENTON: How many occasions?

CAUTHERN: Twice.

DENTON: Did anyone see her come to Faith Drive the night that she met you at Faith Drive.

CAUTHERN: Maybe the neighbors.

DENTON: What car was she in?

CAUTHERN: The Mercedes.

DENTON: Where did she say her husband was?

CAUTHERN: She didn't.

DENTON: O.K. Going back to the house, did you have on gloves?

CAUTHERN: No.

DENTON: You didn't have on gloves. Was a ski mask worn?

CAUTHERN: No.

DENTON: Was Mrs. Smith raped?

CAUTHERN: Yes.

(p. 13) DENTON: She tell you she was raped?

CAUTHERN: She wasn't raped, she went along with it.

DENTON: After seeing that her husband was dead?

CAUTHERN: No. She didn't ask about her husband; she took her clothes off in front of me.

DENTON: And where did she take her clothes off?

CAUTHERN: In the bedroom.

DENTON: Which one?

CAUTHERN: The center bedroom. And she laid down on the bed.

DENTON: What kind of clothes did she have on?

CAUTHERN: Some kind of nightgown.

DENTON: What color?

CAUTHERN: I don't know.

DENTON: Was it long, short, describe it.

CAUTHERN: Long.

DENTON: Light-colored, dark-colored?

CAUTHERN: Light-colored.

DENTON: Did she have on underclothes?

CAUTHERN: I don't know.

DENTON: What did she say to you during all this?

CAUTHERN: She said she was sorry.

DENTON: Sorry about what?

CAUTHERN: That she done something like that.

DENTON: Did she say anything else to you?

CAUTHERN: No. She didn't even ask about Patrick, her husband.

(p. 14) DENTON: Did she ever know that he was dead?

CAUTHERN: I don't know.

DENTON: Did you drink any wine coolers while you were there at the house?

CAUTHERN: No.

DENTON: Were any drank?

CAUTHERN: Yes.

DENTON: How many?

CAUTHERN: Two.

DENTON: Where were they?

CAUTHERN: They were, I don't know where they came from.

DENTON: Where did you see them being drunk?

CAUTHERN: One upstairs and one before leaving.

DENTON: Did you rape Ms. Smith?

CAUTHERN: No.

DENTON: Were you wearing gloves?

CAUTHERN: No.

DENTON: Are you positive?

CAUTHERN: I'm positive. I was not wearing any gloves.

DENTON: Are you telling me the truth?

CAUTHERN: I'm telling you the truth. I was not wearing gloves.

DENTON: Did you remove any items from the house?

CAUTHERN: No, nothing.

DENTON: Was anything removed?

CAUTHERN: I don't know, what I told Joe, when I found all this stuff in my car.

(p. 15) DENTON: Did you ride in the same car back?

CAUTHERN: Yes, to RockVegas.

DENTON: You were in this Camaro?

CAUTHERN: Right.

DENTON: It's a small car?

CAUTHERN: Right.

DENTON: Were there any items in the car?

CAUTHERN: Nothing. Nothing was in the car.

DENTON: To this day, do you know of anything that was taken out of the house?

CAUTHERN: Credit cards.

DENTON: Anything else?

CAUTHERN: A jacket.

DENTON: What else?

CAUTHERN: A gray Member's Only jacket made out of leather.

DENTON: O.K. What else was taken from the house?

CAUTHERN: That's it.

DENTON: Was a VCR taken?

CAUTHERN: I don't think so, I never saw one.

DENTON: Would you have seen it if it were in the Camaro?

CAUTHERN: Yes, because the trunk was full and there was no room in the back seat to put one.

DENTON: Were any gloves worn?

CAUTHERN: A right hand glove.

DENTON: Did you remove one watch and one ring from that house?

CAUTHERN: No.

(p. 16) DENTON: Did you give a watch and ring to a young lady here in town? That works at the Showdown's?

CAUTHERN: Yes.

DENTON: When did you give the watch and the ring . . . What's the lady's name?

CAUTHERN: Jackie.

DENTON: When did you give her these items?

CAUTHERN: I gave them to her Saturday night when I saw the credit cards.

DENTON: Did you tell her where you got them?

CAUTHERN: No. Yes.

DENTON: That's all you told her?

CAUTHERN: Right.

DENTON: Describe the watch.

CAUTHERN: It was small and it was gold, I'm not sure what kind of watch it was.

DENTON: Describe the ring.

CAUTHERN: It was gold, had little bitty sapphire thing on it and a little one on the bottom.

DENTON: Have you ever seen that ring or that watch or Ms. Smith's hand?

CAUTHERN: No, never.

DENTON: Did you go by the house and break into the house and commit the act of burglary thinking no one would be there?

CAUTHERN: No. I want to the house due to the fact I talked to her and she told me to come by and knock on the back door.

- DENTON: Did you look in the basement where the cars are?

CAUTHERN: No.

(p. 17) DENTON: Did you raise the garage door?

CAUTHERN: No.

DENTON: Was an attempt made to raise the garage door?

CAUTHERN: Not while I was there.

DENTON: Did you open any drawers or closets in the house?

CAUTHERN: No, nothing in the house was touched when I left.

DENTON: You didn't stack any books . . .

CAUTHERN: No.

DENTON: Downstairs, where the VCR was sitting?

CAUTHERN: No. Nothing in the house was touched when I left. Not anything.

DENTON: Do you have questions, Joe?

GRIFFY: Yesterday you told me that you did have sex with Ms. Smith while you were in the house, right?

CAUTHERN: Right.

GRIFFY: Now you say you didn't, why are you telling us something different today than yesterday?

CAUTHERN: I did both days.

GRIFFY: You mean you broke in the house and did have sex with Ms. Smith?

CAUTHERN: Right.

GRIFFY: And yesterday, you told me that ya' left the house first time, that her purse was taken.

CAUTHERN: That's right, and the credit cards.

GRIFFY: And the purse. While ago, you said you didn't take nothing the first time you were there.  
(inaudible)

DENTON: Answer yes or no.

GRIFFY: Yes, the purse was taken when ya left?

(p. 18) CAUTHERN: The purse was taken but nothing was taken out of the purse.

DENTON: Did you have a .38 revolver with you when you went in the house?

CAUTHERN: No.

DENTON: Did you have a penlite?

CAUTHERN: No. There was one penlite.

DENTON: One penlite?

CAUTHERN: Right.

DENTON: Did you have a short section of rope in your pocket.

CAUTHERN: No, but there was a short section of rope in a pocket.

DENTON: You didn't have a short rope . . .

CAUTHERN: No. I didn't even know a short rope was brought. And I didn't touch either one of the victims.

GRIFFY: I've got another question. You said you didn't want Pat, Ms. [sic, Mr.] Smith, her husband, to know that, that's why you didn't go into Stacey's, you didn't want him to see you together? And yet you'd go to the house at night, pretty sure he'd be at home at night, didn't you?

CAUTHERN: No.

GRIFFY: Didn't think he'd be there?

CAUTHERN: No, he was not supposed to be there.

GRIFFY: O.K., is that why you went out there?

CAUTHERN: Right. Because a lot of times, he leaves her alone.

GRIFFY: O.K., you said yesterday something about she was planning on having him killed.

CAUTHERN: She was going to get rid of him.

(p. 19) GRIFFY: Get rid of him, yesterday you said.

CAUTHERN: She said she was gonna get rid of him, no matter what it took.

GRIFFY: All right.

DENTON: Did you help kill Mr. Smith?

CAUTHERN: No.

DENTON: Did you jump on the bed?

CAUTHERN: No.

DENTON: Did you cut the telephone wires?

CAUTHERN: No. I didn't cut the telephone wires. I didn't jump on the bed, and I didn't strangle either one of them.

DENTON: You had been at their house before?

CAUTHERN: To the front doorstep.

DENTON: Never been no further?

CAUTHERN: No.

DENTON: You've done work for them in the past?

CAUTHERN: Yes.

DENTON: Yard work?

CAUTHERN: No, never, I've never went to their house for any other reason than to pick up a check one time.

DENTON: Did Mr. Smith ever take you to a doctor?

CAUTHERN: No, he didn't ever take me to a doctor. I met him at the hospital and he went with me to the emergency room to get a piece of metal out of my eye.

DENTON: How long have you known them?

CAUTHERN: No more than a year.

DENTON: Been friends with them?

(p. 20) CAUTHERN: Right.

DENTON: They've been to your house? Both of them?

CAUTHERN: Right.

DENTON: And they've (inaudible) there before?

CAUTHERN: No.

DENTON: How often have you talked to Ms. Smith over the past year? How many times a month would you have a conversation (inaudible)?

CAUTHERN: I've seen them once every two or three months.

DENTON: The work you done, they paid you?

CAUTHERN: Right.

CAUTHERN: I was at RockVegas before I left to go to the Smith house.

DENTON: Did you go by Charlie Hand's house that night?

CAUTHERN: No.

DENTON: Had ya' planned on breaking into Charlie Hand's house?

CAUTHERN: No.

DENTON: Or robbing Charlie Hand?

CAUTHERN: No.

DENTON: And then decided to go to the Smith's house instead when you found the vehicle not there?

CAUTHERN: No.

DENTON: Did you tell Joe last night that she was raped before you raped her.

CAUTHERN: No.

DENTON: But yet, she lay there and didn't offer any resistance.

(p. 21) CAUTHERN: No, she didn't.

DENTON: She offered no resistance?

CAUTHERN: No.

DENTON: Did she give sex willingly last, that night?

CAUTHERN: Yes.

DENTON: Two times?

CAUTHERN: Yes.

DENTON: With her husband in the bedroom?

CAUTHERN: Yes, she did.

DENTON: After being woke up in her own home in bed with a flashlight in her eyes, she gave sex to you?

CAUTHERN: Yes, she did.

DENTON: Offered no resistance?

CAUTHERN: No resistance.

DENTON: Were you standing there when Mr. Smith was strangled to death?

CAUTHERN: No, I was not.

DENTON: Where were you?

CAUTHERN: I was hiding her in the closet and running out of the house.

DENTON: Ran out of the house?

CAUTHERN: Right.

DENTON: Run out the back door or the front door?

CAUTHERN: Back door.

DENTON: Where did you go?

CAUTHERN: I went out to the car, to leave and I heard her scream and came back in.

DENTON: So, all of this that happened, you're not (p. 22) responsible for any of it?

CAUTHERN: I didn't strangle anybody, I didn't take anything and I didn't plan it.

DENTON: Why did you go in?

CAUTHERN: I don't know.

DENTON: Well nobody else knows if you don't know. Tell me why you went in the house.

CAUTHERN: When the back door was kicked in, I followed.

DENTON: Did you hear somebody upstairs?

CAUTHERN: A noise was heard and that's when the phone line was cut.

DENTON: Could you have left?

CAUTHERN: Yes, I could have left.

DENTON: Was you driving the Camaro that night?

CAUTHERN: No, I didn't have the keys to the Camaro.

DENTON: But you could have left?

CAUTHERN: I could have ran, yes.

DENTON: Why didn't you?

CAUTHERN: I didn't know what else to do.

DENTON: So you stayed there, went in the house after the phone lines were cut, you burglarized the house, you broke in the house, you went upstairs and you watched Mr. Smith being strangled to death on his bed, while you put her in the closet?

CAUTHERN: He wasn't being strangled (inaudible) it was a fight.

DENTON: Fighting on the bed?

CAUTHERN: Yes.

DENTON: Did the bed break during the fight?

CAUTHERN: I don't know.

(p. 23) DENTON: You saw all this happening . . .

CAUTHERN: And I ran to the phone and it didn't work . . .

DENTON: So you touched the phone and your fingerprints should be on that phone?

CAUTHERN: Right.

DENTON: Which phone did you run to?

CAUTHERN: The one in the front, near the kitchen.

DENTON: What color was the phone?

CAUTHERN: I don't know, it was dark.

DENTON: How did you know your way around in the dark, to be able to run through the house and you had never been in it?

CAUTHERN: I didn't.

DENTON: Did you knock over anything?

CAUTHERN: I don't know.

DENTON: So you ran through the room and you just happened to make it without hitting anything, back to the phone in the kitchen, where was the phone?

CAUTHERN: The phone was near the back of the house, sitting on a shelf.

DENTON: Was the phone dark or light?

CAUTHERN: I don't know.

DENTON: How did you know it was a phone if you couldn't see?

CAUTHERN: The shape of it.

DENTON: How did you know there was a phone in that room?

CAUTHERN: I didn't.

DENTON: But yet you ran to that room in the house.

CAUTHERN: I went (inaudible)

(p. 24) DENTON: In a dark house.

CAUTHERN: And there should be fingerprints?

DENTON: And you, what time did you know Mr. Smith was dead?

CAUTHERN: When I left.

DENTON: How did you know?

CAUTHERN: I was told he was.

DENTON: When did you know Ms. Smith was dead?

CAUTHERN: When I left.

DENTON: This is somebody you are supposed to have had a love affair with, right?

CAUTHERN: Yes.

DENTON: And possibly even talked to her about killing her husband?

CAUTHERN: Yes.

DENTON: And yet you had sex with her knowing this?

CAUTHERN: Knowing what?

DENTON: What all was taking place at the time.

CAUTHERN: Yes.

DENTON: Are you wanting to change any of your statement at this time?

CAUTHERN: No.

DENTON: You had knowledge that both victims were dead, that a burglary had been committed, phone lines cut, merchandise taken from the house, and you didn't call the police?

CAUTHERN: No.

DENTON: Why?

CAUTHERN: Cause I knew I would be a prime suspect, cause I (p. 25) knew the people.

DENTON: Are you a prime suspect?

CAUTHERN: Yes, I am.

DENTON: Are you guilty?

CAUTHERN: Of murder, no.

DENTON: What are you guilty of?

CAUTHERN: Going in.

DENTON: That's all you're guilty of?

CAUTHERN: Not rape and not murder and not taking anything.

DENTON: Would you consider that to be an accessory to murder?

CAUTHERN: Yes, I would.

DENTON: Then, you're just as guilty, aren't you?

CAUTHERN: Yes, I am.

DENTON: After telling me things, would you like to tell me again, just exactly this time, just exactly what happened?

CAUTHERN: No.

DENTON: Why?

CAUTHERN: Cause I know what I'm facing.  
(attempted to turn off machine)

DENTON: It's got to stay on.

CAUTHERN: No, Chuck.

DENTON: Do you know of anything else that was taken out of the house?

CAUTHERN: A man's wedding band was taken and pawned in a pawn shop.

DENTON: Do you know which one?

(p. 26) CAUTHERN: No.

DENTON: How much money did you get for it?

CAUTHERN: Twenty dollars.

DENTON: Anything else?

CAUTHERN: No.

DENTON: Clothes?

CAUTHERN: No.

DENTON: No clothes were taken out of the house?

CAUTHERN: A jacket.

DENTON: Other than the jacket?

CAUTHERN: No.

DENTON: A suitcase?

CAUTHERN: No.

DENTON: Two suitcases?

CAUTHERN: Yes, yes, there were suitcases taken out.

DENTON: What was in the suitcases?

CAUTHERN: Nothing.

DENTON: Clothes?

CAUTHERN: There was nothing in the suitcases when I saw them.

DENTON: How big were the suitcases?

CAUTHERN: One big one.

DENTON: How big? How many inches would you say it was?

CAUTHERN: Thirty inches (inaudible) twelve inches (wide or long).

DENTON: What color was it?

CAUTHERN: Tan and brown.

(p. 27) DENTON: Where was it put?

CAUTHERN: At Faith Drive in the bedroom.

DENTON: What time did you leave the house?

CAUTHERN: Around ten or ten thirty and was in there thirty minutes.

CAUTHERN: I was at RockVegas after leaving the Smith house.

DENTON: Who saw you there?

CAUTHERN: Johnny the bartender, Jackie, and other people who were there that know me.

DENTON: What time did you get there?

CAUTHERN: Eleven, eleven-fifteen.

DENTON: What time did you leave?

CAUTHERN: Late.

DENTON: How late?

CAUTHERN: Two or three in the morning.

DENTON: Who saw you leave?

CAUTHERN: The security guard.

DENTON: Where did you go?

CAUTHERN: I went back to Faith Drive.

DENTON: Which car did you drive back to Faith Drive?

CAUTHERN: I didn't, I walked.

DENTON: You walked back to Faith Drive?

CAUTHERN: I walked back to Faith Drive. Joe was there.

DENTON: Joe who?

CAUTHERN: Joe Denning was at RockVegas while I was there. Chuck . . .

[CAUTHERN TURNS VISIBLE TAPE RECORDER OFF]

(p. 28) DENTON: Don't cut it off.

CAUTHERN: And I know it's over and I know I can't change it and that's it. It was my fault.

DENTON: We can't cut this off, they'll throw everything out.

CAUTHERN: They can throw it all out.

DENTON: It's got to stay on.

CAUTHERN: No, Chuck.

DENTON: Go ahead.

CAUTHERN: I mean, I couldn't stop it, there was no way for me to.

DENTON: Ronnie, you planned this thing.

CAUTHERN: No, I didn't. —

DENTON: You went to this house?

CAUTHERN: I didn't plan it, Chuck, I did not plan it. I didn't know entry was going to be made into the house and I knocked on the door for her to come downstairs.

DENTON: Ronnie, you sit here and lie to me again. You've said that you didn't take the stuff out, the watch

and the ring were brought back to the office today by the young lady you give it to.

CAUTHERN: I didn't take it. There's a wedding band from him too, somewhere. In a pawn shop.

DENTON: Which pawn shop?

CAUTHERN: I don't know. The ring was pawned for twenty dollars.

(p. 29) DENTON: Do you know of anything else that was taken out of the house?

CAUTHERN: A man's wedding band was taken and pawned at a pawn shop.

DENTON: Do you know which one?

CAUTHERN: No.

DENTON: How much money did you get for it?

CAUTHERN: Twenty Dollars.

CAUTHERN: Chuck, this ain't right.

DENTON: I know it's not right Ronnie. I know it's not right. I can tell by looking in your beady little eyes you're not telling the truth and we're wasting our time.

DENTON: What are you doing that for?

CAUTHERN: Rewinding it.

DENTON: Through?

CAUTHERN: Yeah.

DENTON: I need to put on there what time we terminated, let me handle this, O.K.

CAUTHERN: I say we destroy it.

DENTON: No we're not going to destroy it.

CAUTHERN: Why?

DENTON: Quit.

CAUTHERN: Come on Chuck.

DENTON: Quit, Ronnie.

GRIFFY: You through talking Ronnie?

CAUTHERN: Yes. (inaudible)

DENTON: Investigation interview terminated 4:53, January 13. Ronnie Cauthern has been taken back to his (p. 30) cell. Joe Griffy and Charles Denton terminating the interview.

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Supreme Court, U.S.

FILED

MAR 30 1990

JOSEPH F. SPANIOL, JR.  
CLERK

In The

Supreme Court of the United States  
October Term, 1989

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STATE OF TENNESSEE,

*Petitioner,*

vs.

RONNIE M. CAUTHERN,

*Respondent.*

---

On Writ of Certiorari To The  
Supreme Court Of Tennessee At Nashville

---

RESPONSE TO PETITION FOR THE  
WRIT OF CERTIORARI

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HUGH REID POLAND, JR.  
POLAND & POLAND  
Attorneys at Law  
408 Franklin Street  
Clarksville, Tennessee 37040  
(615) 552-3475

*Counsel for Respondent*



**QUESTIONS PRESENTED FOR REVIEW  
BY PETITIONER**

1. Whether the Supreme Court of Tennessee impermissibly expanded the scope of *Miranda v. Arizona* in concluding that the respondent invoked his right to remain silent by merely refusing to make a truthful statement and by indicating a desire to not have his statement tape recorded?
2. Whether the alleged Fifth Amendment error was harmless beyond a reasonable doubt?

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OPINION BELOW

The Respondent adopts by reference and incorporates the language of the Petitioner as set forth in its "Opinion Below" and also adopts by reference and incorporates Appendix A and B of Petitioner.

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## JURISDICTION

The petitioner has stated this Court's Jurisdiction is invoked under 28 U.S.C. § 1254(1).

We submit this *is not* proper. If this Court's jurisdiction is invoked at all, it would be under 28 U.S.C. § 1257, "Jurisdiction To Review Decisions of State Courts."

There are two major routes by which cases in state courts may reach this Court – appeal and certiorari. Under either method, this Court's jurisdiction depends upon the federal character of the question or questions at issue. One must first choose between these two alternative means. The petitioner, may ask this Court to review the judgment of the Tennessee Supreme Court by selecting either § 1257(1) or § 1257(2) or § 1257(3).

The first two choices are reviewed by appeal and the third by certiorari. To proceed at this point respondent must assume petitioner would have selected the third choice, certiorari, since that is what petitioner selected under § 1254(1), erroneously.

Under § 1257(3), this Court's jurisdiction by way of certiorari to review, manifests itself in three situations: (1) where the validity of a federal treaty or statute is drawn in question; (2) where the validity of a state statute is drawn in question on the grounds of its being repugnant to federal law; and (3) where a title, right, privilege, or immunity is set-up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The first two of the above situations related to the same types of federal issues as underlie the right to appeal to this Court under § 1257(1) and § 1257(2).

The third situation above, finds no counterpart in this Court's jurisdiction, by way of appeal. In such cases, this Court's jurisdiction can only be invoked by a petition for certiorari.

In short, §1257(3) covers the entire range of federal questions that may arise in a case in a state court. All such questions are within the certiorari jurisdiction of this Court.

Respondent further submits this case is "not final," when considering the options available to the state, upon retrial.

At this juncture, respondent respectfully asks this Court to deny the petition for writ of certiorari by objecting to petitioner's failure to properly invoke jurisdiction, and because the proceedings below are not final.

Upon reviewing the *Rules of the Supreme Court of the United States*, in particular Rule #15.4, respondent though objecting to jurisdiction, must continue to reply to the petition for writ of certiorari.

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## CONSTITUTIONAL PROVISIONS INVOLVED

### U. S. CONSTITUTIONAL AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy or life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### U. S. CONSTITUTIONAL AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defense.*

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#### STATEMENT OF THE CASE

Respondent, adopts by reference and incorporates the petitioner's *Statement Of The Case.*

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#### REASONS FOR DENYING THE WRIT

1. The Supreme Court of Tennessee, did not expand the scope of *Miranda v. Arizona*, 384 U.S. 436 (1966).

Under, *Miranda*, this Court established procedural safeguards to protect defendants under custodial interrogation.

Once adversary proceedings have begun the Sixth Amendment right to counsel is violated when the State knowingly exploits the opportunity to record statements of the accused made in the absence of counsel, even though the meeting was requested by the accused. *Miane v. Moulton*, 474 U.S. 159 (1985).

If questioning continues after warning, a heavy burden rests on the state to show a waiver was knowingly and intelligently waived. *Tague v. Louisiana*, 444 U. S. 469 (1980).

Procedural safeguards established by the Court to cut off questioning, require the authorities to immediately cease interrogating an accused, once the accused indicates in any manner, at any time prior to or during interrogation, that he does not wish to continue; *Miranda v. Arizona*, 384 U. S. 96 (1966); *Michigan v. Moseley*, 423 U.S. 96 (1975).

Law enforcement can talk with Defendant even after **Miranda so long as Defendant doesn't say or indicate he wants his lawyer.** Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. 384 U.S. 436.

Respondent submits the details given in the third statement and its subsequent submission to the jury were a key factor in respondent receiving the death penalty and his co-defendant Patterson receiving a life sentence.

The respondent asks this Court to consider the totality of the circumstances surrounding the entire interrogation process (Appendix B, App. 23-59). We submit that the *Miranda* decision does require the Supreme Court of Tennessee to reach the decision it did and that the State court did not expand the scope of *Miranda* beyond the rulings of this Court.

**2. The alleged Fifth Amendment error was not harmless beyond a reasonable doubt.**

Throughout trial the co-defendants acted in concert. They both wore ski-masks, gloves, and carried pistols. Both broke into the residence. Both participated in the murders of both victims and raped Mrs. Smith. (Appendix A, App. 8-9)

In the *Satterwhite* case, this Court ruled the admissions of testimony were not harmless, because the lower court could not say beyond a reasonable doubt that the testimony did not influence the sentencing jury, even though the other testimony would support the death sentence. The question is not whether the legally admitted evidence would support the death sentence, but whether the state has proved beyond a reasonable doubt, that the error complained of did not contribute to the verdict of death *Satterwhite v. Texas*, 486 U.S. 249 (1988); *Estelle v. Smith*, 451 U.S. 454 (1981).

In respondent's case, the State court cannot say that the admission of the contents of the defendant's statement recorded on the second secretly hidden tape recorder, did not have any effect on the verdict of death and that its admission was not harmless error beyond a reasonable doubt. (Appendix A, App. 12-16 and 18-20)

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### CONCLUSION

For the reasons stated, the respondent urges this Court to deny the writ of certiorari.

HUGH REID POLAND, JR.  
POLAND & POLAND,  
Attorneys at Law  
408 Franklin Street  
Clarksville, Tennessee 37040  
(615) 552-3475

*Counsel for Respondent*



**App. 1**

**APPENDIX A & B**

Respondent Adopts by Reference and Incorporates the Appendices of the Petitioner.

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